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RIGHT OF HUSBAND TO CHASTISE WIFE.

UNDER THE ROMAN LAW.

Under the early Roman law the marital power of the husband was absolute, and he could chastise his wife even to the point of killing her.[1] Bryce says that this absolute power was confined to very primitive times;[2] and another writer on Roman law has doubted the power of the husband to put the wife to death.[3] During the later period of the Roman law the husband's power over his wife was much curtailed. Blackstone, after speaking of the husband's right of chastisement under the common law, says: "The civil law gave the husband the same, or a larger, authority over his wife."[4]

UNDER COMMON LAW AND IN GREAT BRITAIN.

By the old common law rule the husband had the right to inflict moderate personal chastisement on his wife,[5] provided he used, as some of the old authorities stated it, a switch no larger than his thumb.[6] It is not easily seen how the thumb should have been the standard of size for the instrument which the husband might use. A light blow, or many light blows, with a stick larger than the thumb, might produce no injury; but a switch half the size might be so used as to produce death. The

1. Sohm Inst., § 93; 21 Cyc. 1143.
2. Bryce Studies Hist. and Jur., 787.
3. Hunter Rom. L. (3d ed.), 224.
4. 1 Blackstone Comm., 444, 445.
5. Bacon's Abr., title Assault and Battery, C., 373; 1 Hawk. P. C. 180; Moor, 874; Rex *v.* Lister, 1 Stra. 478, 875; Matter of Cochran, 8 Dowl. P. C. 630, 4 Jur. 534. See also, Mathewson *v.* Mathewson (Conn.), 63 Atl. 285, 5 L. R. A. (N. S.) 611, 615; Brown *v.* Brown (Conn.), 89 Atl. 889; James *v.* Commonwealth (Pa.), 12 Sergeant and Rawles 220, 226.
6. See State *v.* Oliver, 70 N. C. 60; State *v.* Rhodes, 61 N. C. 453.

standard should have been the effect produced, and not the manner of producing it, or the instrument used.[7]

Blackstone says: "The husband also, by the old law, might give his wife moderate correction. For, as he is to answer for her misbehaviour, the law thought it reasonable to intrust him with this power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his apprentices or children; for whom the master or parent is also liable in some cases to answer. But this power of correction was confined within reasonable bounds, and the husband was prohibited from using any violence to his wife. * * * But with us, in the politer reign of Charles the Second, this power of correction began to be doubted; and a wife may now have security of the peace against her husband; or, in return, a husband against his wife. Yet the lower rank of people, who were always fond of the old common law, still claim and exert their ancient privilege: and the courts of law will still permit a husband to restrain a wife of her liberty, in case of any gross misbehaviour." [8]

The old law of moderate correction has been repudiated in Ireland and Scotland,[9] and is now obsolete in England.[10] In a case decided over half a century ago it was held that, though a husband may use some violence to restrain his drunken wife if she uses personal violence toward him or destroys his property, etc., he cannot follow and beat her as "there is no law authorizing a man to beat his drunken wife." [11] And in 1891 Lord Chancellor Halsbury said: "I confess that some of the propositions which have been referred to during the argument are such as I should be reluctant to suppose ever to have been the law in England. * * * In the same way such quaint and absurd dicta as are to be found in the books as to the right of the husband over his wife in respect of personal chastisement,

7. State *v.* Rhodes, 61 N. C. 453, 459.

8. 1 Blackstone Comm., p. 444, 445.

9. See State *v.* Rhodes, 61 N. C. 453, 456.

10. See Owen *v.* State, 7 Tex. Crim. App. 329, 337.

11. Pearman *v.* Pearman, 1 Swab. & Tristam, 601, cited in Commonwealth *v.* McAfee, 108 Mass. 458, 11 Am. Rep. 383, 385.

are not, I think, capable of being cited as authorities in a court of justice in this or any civilized country." [12]

In the United States.

Recognition of Right of Chastisement.

The right of a husband to chastise his wife has been recognized in this country. Chancellor Kent laid down the rule that the husband may put "gentle restraints upon her liberty, if her conduct is such as to require it." [13] For the old doctrine that a man had a right to thrash his wife whenever he pleased, provided he did not "use a switch larger than his thumb," or did not "do serious bodily harm or inflict permanent injury," three reasons were given: (1) It is the "husband's duty to make his wife behave herself" and thrash her if necessary to that end. (2) "To draw a veil over dealings between man and wife," the idea being that a little wholesome chastising, to "make her behave herself," privately administered, would make less noise and scandal than the publicity of a court trial. (3) That there was a long line of decisions giving the husband privilege and immunity to inflict chastisement.[14]

The first case to be decided in this country recognizing the right was handed down by the Supreme Court of Mississippi almost a century ago. In the year 1824, one Bradley stood before the bar of justice indicted for committing an assault and battery upon the wife of his bosom. In that case,[15] the rule was laid down that a husband should still be permitted to exercise the right to moderately chastise his wife in cases of great emergency, without subjecting himself to vexatious prosecutions for assault and battery, resulting in the discredit and shame of all parties concerned. But in 1894 the Mississippi court repudiated the "revolting precedent" of the earlier case. The court said: "The suggestion in the evidence of a belief among

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12. Reg. *v.* Jackson, 1 L. R. Q. B. D. 671, quoted in Powell *v.* Benthall, 136 N. C. 145, 154, 48 S. E. 598.

13. 2 Kent's Comm., 181, cited in Fulgham *v.* State, 46 Ala. 143, 147.

14. State *v.* Fulton, 149 N. C. 485, 498, 63 S. E. 145 (dissenting opinion).

15. Bradley *v.* State, 1 Miss. (Walk.) 156.

the humbler class of our colored population of a fancied right in the husband to chastise the wife in moderation makes it proper for us to say that this brutality found in the ancient common law, though strangely recognized in Bradley *v.* State, Walk. (Miss.) 156, has never since received countenance; and it is superfluous to now say that the blind adherence shown in that case to revolting precedent has long been utterly repudiated, in the administration of criminal law in our courts." [15]

In an early Maryland case it was held that the court of chancery had authority to order a husband living with his wife to give sufficient security under penalty to treat his wife well, and not do her any other harm than such as he may by government and chastisement.[17]

The Massachusetts court refused to issue a *writ of supplicavit* on the petition of a wife against her husband, who was guilty of such cruel treatment of her as would entitle her to a divorce from bed and board, even though she had religious scruples against applying for a divorce.[18]

North Carolina—Noninterference of Courts—Change of Rule.

In a case decided in 1864 the North Carolina court said: "A husband is responsible for the acts of his wife, and he is required to govern his household, and for that purpose the law permits him to use towards his wife such a degree of force as is necessary to control an unruly temper and make her behave herself; and unless some permanent injury be inflicted, or there be excess of violence, or such a degree of cruelty as shows that it is inflicted to gratify his own bad passions, the law will not invade the domestic forum or go behind the curtain. It prefers to leave the parties to themselves, as the best mode of inducing them to make the matter up and live together

16. Harris *v.* State, 71 Miss. 462, 14 So. 266.

17. Bread's Case, 2 Bland (Md. Ch.) 562, note.

18. "The form of the writ was, to compel the husband, 'that he shall well and honestly treat and govern the aforesaid B. (his wife), and that he shall not do nor procure to be done any damage or evil to her of her body, otherwise than what reasonably belongs to her husband for the purpose of the government and chastisement of his wife lawfully.'" Adams *v.* Adams, 100 Mass. 365, 369.

as man and wife should." [19] In other cases it was held that while the laws of North Carolina did not recognize the right of the husband to whip his wife, the courts would not interfere to punish him for moderate correction of her, even if there had been no provocation for it.[20] But where the battery was so great and excessive as to put life and limb in peril, or where permanent injury to the person was inflicted, or where it was prompted by a malicious and wrongful spirit, and not within reasonable bounds, the courts interposed to punish,[21] for as was said in one case, "there is no relation which can shield a party who is guilty of malicious outrage or dangerous violence committed or threatened." [22] Finally the rule was laid down as follows: "We may assume that the old doctrine that a husband has a right to whip his wife provided he used a switch no larger than his thumb, is not law in North Carolina. Indeed,

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19. State *v.* Black, 60 N. C. 262, 86 Am. Dec. 426.

In this case, the wife commenced the quarrel. The husband, in a passion provoked by excessive abuse, pulled her upon the floor by the hair, but restrained himself, did not strike a blow, and she admits he did not choke her, and she continued to abuse him after she got up. Upon this state of facts the court held that the jury ought to have been charged in favor of the husband.

20. State *v.* Rhodes, 61 N. C. 453, 459; State *v.* Mabrey, 64 N. C. 592, 593; State *v.* Hussy, 44 N. C. 123. See also, State *v.* Edens, 95 N. C. 696, 59 Am. Rep. 294; State *v.* Davidson, 77 N. C. 522.

"It will be observed that the ground upon which we have put this decision, is not that the husband has the right to whip his wife much or little; but that we will not interfere with family government in trifling cases. * * * We will not inflict upon society the greater evil of raising the curtain upon domestic privacy, to punish the lesser evil of trifling violence." State *v.* Rhodes, 61 N. C. 453, 459.

21. State *v.* Edens, 95 N. C. 696, 59 Am. Rep. 294, 295. See State *v.* Davidson, 77 N. C. 522.

22. State *v.* Mabrey, 64 N. C. 592, 593.

Where, upon some words between husband and wife he used to her very improper language when she started to go off, and caught her by the left arm and said he would kill her, drawing his knife with the other hand; then, holding her, struck at her with the knife but did not strike her, and again drawing back as if to strike, his arm was caught by a bystander, but after all no injury or blow was inflicted, it was held to have been a case in which the courts will interfere, and that the husband was guilty of assault. State *v.* Mabrey, 64 N. C. 592.

the courts have advanced from that barbarism until they have reached the position that the husband has no right to chastise his wife under any circumstances." [23]

Repudiation of Right of Chastisement—Present Rule.

The right of the husband to chastise his wife has generally met with disapproval in the United States and at this late date is entirely obsolete even in those states which formerly acquiesced in the practice. And it is now as unlawful for a husband to beat his wife as for another to do so, and he is amenable to the criminal law for such offense.[24] The rule of love has su-

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23. Sate *v.* Oliver, 70 N. C. 60, quoted in Powell *v.* Benthall, 136 N. C. 145, 154, 48 S. E. 598, where the court said: "The case is regarded as the latest and best judicial expression of the law conforming to the sentiment of the most enlightened statesmen and jurists of the age." See also, State *v.* Dowell, 106 N. C. 722, 11 S. E. 525; State *v.* Fulton, 149 N. C. 485, 496, 63 S. E. 145 (dissenting opinion); Price *v.* Electric Co., 160 N. C. 450, 455, 76 S. E. 502 (dissenting opinion).

In State *v.* Oliver, 70 N. C. 60, the defendant came home intoxicated and then went out and brought in two switches to whip his wife. He then struck her five licks with the switches, which were about four feet long, with the branches on them about half way and some leaves. One of the switches was about half as large as a man's little finger; the other not so large. Upon these facts the court found defendant guilty and fined him $10, and on appeal the judgment was affirmed.

24. Alabama.—Fulgham *v.* State, 46 Ala. 143.

Colorado.—Bailey *v.* People (Colo.), 130 Pac. 832, 835.

Connecticut.—Brown *v.* Brown (Conn.), 89 Atl. 889, 890.

Delaware.—State *v.* Buckley, 2 Har. (Del.) 552.

Georgia.—Lawson *v.* State, 115 Ga. —, 41 S. E. 993.

Iowa.—Knight *v.* Knight, 31 Iowa 451, 459. (Dissenting opinion.)

Kentucky.—Richardson *v.* Lawhon, 4 Ky. Law Rep. (abstract) 998; Carpenter *v.* Commonwealth, 92 Ky. 452, 18 S. W. 9.

Massachusetts.—Comm. *v.* McAfee, 108 Mass. 458, 11 Am. Rep. 383.

Mississippi.—Harris *v.* State, 71 Miss. 462, 14 So. 266.

New Hampshire.—Poor *v.* Poor, 8 N. H. 307, 29 Am. Dec. 664.

New York.—People *v.* Winters, 2 Parker's Crim. Cas. 10; Perry *v.* Perry, 2 Paige, 501, 503; People *v.* Mercein (N. Y.), 38 Am. Dec. 644.

North Carolina.—Powell *v.* Benthall 136 N. C. 145, 48 S. E. 598; State *v.* Fulton, 149 N. C. 485, 497, 63 S. E. 145, (dissenting opinion).

Ohio.—Bascom *v.* Bascom (Ohio), Wright 632.

Texas.—Owen *v.* State, 7 Tex. App. 329; Gorman *v.* State, 42 Tex. 221, 223.

perseded the rule of force.[25] And now the moral sense of the community revolts at the idea that the husband may inflict personal chastisement upon his wife, even for the most outrageous conduct.[26]

It has been held that a husband cannot beat his adulterous,[27] drunken,[28] insolvent,[29] or refractory wife.[30] Nor is the husband justified in striking his wife in resentment of a past injury, consisting of an assault upon him or his property; and this is true although the assault may have been in the immediate past.[31] The law which attached such subjection to the legal status of a married woman was abolished, not by direct legislation, but by the continuous pressure of judicial interpretation or indirect legislation.[32]

This authority, on the part of the husband, to chastise the wife with rudeness and blows in order to coerce her obedience to his domestic commands, was not admitted in the age of Blackstone, or as he says, "in the politer reign of Charles the Second," except among "the lower rank of the people, who were always fond of the old common law," by which "they claim and exert their ancient privilege" to give their wives "moderate correction," to secure subordination in the family. It will be seen from this reference, that this eminent and classic commentator on the laws of England confines this brutal and unchristian "privilege" wholly to the "lower rank of the people." The most zealous advocates of "wife-whipping" have never gone beyond this unhappy rank. It has never been contended that this liability to be corrected with blows and stripes was the law for the wives of all the people—of those of the higher as well as those of the lower rank. Blackstone published his com-

25. Schoul. Dom. R. 59, cited in Fulgham *v.* State, 46 Ala. 143, 147.

26. Poor *v.* Poor, 8 N. H. 307, 29 Am. Dec. 664; Knight *v.* Knight, 31 Iowa 451, 459 (dissenting opinion).

27. Shacklett *v.* Shacklett, 49 Vt. 193, 197.

28. Commonwealth *v.* McAfee, 108 Mass. 458, 11 Am. Rep. 383.

29. Commonwealth *v.* McAfee, 108 Mass. 458, 11 Am. Rep. 383, 385.

30. Poor *v.* Poor, 8 N. H. 307, 29 Am. Dec. 664.

31. Lawson *v.* State, 115 Ga. ———, 41 S. E. 993.

32. Mathewson *v.* Mathewson, 79 Conn. 23, 27, 63 Atl. 285, 287 (5 L. R. A. [N. S.] 611, 6 Ann. Cas. 1027); Brown *v.* Brown (Conn.), 89 Atl. 889, 890; Price *v.* Electric Co., 160 N. C. 450, 455, 76 S. E. 502 (dissenting opinion).

mentaries when society was much more rude, out of the towns and cities in England, than it is at the present day in this country; and the exercise of a rude privilge there is no excuse for a like privilege here. Since then, however, learning, with its humanizing influences, has made great progress, and morals and religion have made some progress with it. Therefore, a rod which may be drawn through the wedding ring is not now deemed necessary to teach the wife her duty and subjection to the husband. The husband is therefore not justified or allowed by law to use such a weapon, or any other, for her moderate correction. And the privilege, ancient though it be, to beat her with a stick, to pull her hair, choke her, spit in her face or kick her about the floor, or to inflict upon her like indignities, is not now acknowledged by our law.[33]

Restraining Violence or Unlawful Acts of Wife.

Though a husband has no right to inflict corporal punishment on his wife, he may defend himself against her, and restrain her from acts of violence towards himself or others.[34] And he is authorized to use such force as may be necessary to repel a felonious assault by his wife upon him or his property [35]

In a Pennsylvania case it was held that the husband may lay his hands rudely upon his wife to prevent her from committing an unlawful act.[36] And according to a Massachusetts case the husband may exercise as much power as may be reasonably necessary to prevent his wife from making his house a brothel.[37]

Wife Interfering with Exercise of Parental Authority.

In a Texas case it is held that if the chastisement of a child by the father does not exceed the just limit of parental authority, the interference of the mother is unwarranted, and the father is fully justified in using all reasonable and necessary force to protect himself and to restrain and prevent her interference. But it is impossible to indicate with critical and exact accuracy the precise amount and character of force and resistance which he may use.[38] BEIRNE STEDMAN.

33. Fulgham *v.* State, 46 Ala. 143, 146.
34. People *v.* Winters (N. Y.), 2 Parker, Cr. R. 10.
35. Lawson *v.* State, 115 Ga. ——, 41 S. E. 993.
36. Richards *v.* Richards (Pa)., 1 Grant Cases, 389, 392.
37. Comm. *v.* Wood, 97 Mass. 225, 228.
38. Gorman *v.* State, 42 Tex. 221, 223.